

Supreme Court, U. S.

FILED

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In The

Supreme Court of the United States

No. **76-1339**

ROBERT F. PARRATT, Warden, Nebraska Penal and Correctional Complex; JOSEPH VITEK, Director, Nebraska Department of Correctional Services; CAPTAIN DAVID WATSON; CAPTAIN NANCE; and OFFICER AKINS,

Petitioners,

vs.

DENNIS SELL and EDWARD KONDER,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**

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TABLE OF CONTENTS

	Pages
Petition for Writ of Certiorari	1
Opinions Below	2
Grounds for Jurisdiction	2
Questions Presented for Review	3
Constitutional Provisions and Statutes Involved	3
Statement of the Case	9
Reasons for Allowing the Writ	12
Appendix I	A. 1
Appendix II	A. 15

CASES CITED

Baxter v. Palmigiano, — U. S. —, 47 L. Ed. 2d 810	19
Board of Regents v. Roth, 408 U. S. 564	17
Goss v. Lopez, 419 U. S. 565	17
Meachum v. Fano, — U. S. —, 49 L. Ed. 2d 451	14, 16, 17
Montanye v. Haymes, — U. S. —, 49 L. Ed. 2d 466	17
Wolff v. McDonnell, 418 U. S. 539	15, 18

CONSTITUTION CITED

United States Constitution, Ninth Amendment	9
United States Constitution, Tenth Amendment	9
United States Constitution, Fourteenth Amendment	3

STATUTES CITED

	Pages
28 U. S. C. § 1254 (1)	2
28 U. S. C. § 1343	5, 9
42 U. S. C. § 1983	5, 9
Neb. Rev. Stat. § 83-173 (Reissue 1971)	6, 17
Neb. Rev. Stat. § 83-176 (Reissue 1971)	6, 7
Neb. Rev. Stat. § 83-185 (Reissue 1971)	8
Neb. Rev. Stat. § 83-417 (Reissue 1971)	15

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PETITION FOR WRIT OF CERTIORARI

Your petitioners respectfully pray that a writ of cer-
tiorari issue to review the judgment of the United States
Court of Appeals for the Eighth Circuit, entered in the
above entitled case on February 2, 1977.

—o—

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported. A copy of such opinion is separately attached hereto in Appendix No. 1.

The opinion of the United States District Court for the District of Nebraska, which was affirmed by the United States Court of Appeals for the Eighth Circuit, also is not yet reported and a copy thereof is set forth hereto in Appendix No. 2.

GROUND'S FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on February 2, 1977. Appendix 1. This judgment affirmed the judgment of the United States District Court for the District of Nebraska entered February 5, 1976.

The statutory provision believed to confer on the United States Supreme Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. § 1254-(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does a convicted felon legally sentenced to prison have a constitutional right to possess personal property inside the walls of the prison if such property is inherently repugnant to the objectives and interests of the sentence, the prison and society?

2. May the penitentiary authorities summarily, without any type of due process proceeding permanently confiscate personal property found in the possession of an inmate inside the penitentiary when the property is of a type which is required by penitentiary rule to be surrendered by the inmate for safekeeping upon his entrance into the penitentiary because said property is considered by prison authorities to be a threat to the penitentiary security?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Fourteenth Amendment, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

(1) 28 U. S. C. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

(3) 42 U. S. C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress."

(4) Neb. Rev. Stat. § 83-173 (Reissue 1971):

"The Director of Corrections shall:

(1) Supervise and be responsible for the administration of the Division of Corrections;

(2) Establish, consolidate, or abolish any administrative subdivision within the division and appoint and remove for cause the heads thereof, and delegate appropriate powers and duties to them;

(3) Establish and administer policies and programs for the operation of the facilities in the division and for the custody, control, safety, correction and rehabilitation of persons committed to the division;

(4) Appoint and remove the chief executive officer of each facility and delegate appropriate powers and duties to him;

(5) Appoint and remove employees of the division and delegate appropriate powers and duties to them;

(6) Make rules and regulations for the management, correctional treatment and rehabilitation of persons committed to the division, the administration of facilities, and the conduct of officers and employees under his jurisdiction;

(7) Designate the place of confinement of persons committed to the division subject to the provisions of Section 83-176;

(8) Collect, develop and maintain statistical information concerning persons committed to the division, sentencing practices and correctional treatment as may be useful in penological research or in the development of treatment programs;

(9) Provide training programs designed to equip employees for duty in the facilities and related services of the division and to raise and maintain the educational standards and the level of performance of such employees;

(10) Operate the division in conformity with the administrative practices of the Department of Public Institutions;

(11) Transmit annually to the Governor and the Director of Public Institutions a report of the operations of the division for the preceding calendar year, which report shall be transmitted by the Governor to the Legislature; and

(12) Exercise all powers and perform all duties necessary and proper in carrying out his responsibilities."

(5) Neb. Rev. Stat. § 83-176 (Reissue 1971):

"(1) Whenever any person is sentenced or committed under any provision of law to a specific facility within the Division of Corrections or to the custody of the warden or superintendent of such facility, he shall be deemed to be sentenced or committed to the division.

(2) The Director of Corrections may designate as a place of confinement of a person committed to the division any available, suitable and appropriate residence facility or institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another subject to the following:

(a) A minor declared neglected, dependent, or in need of special supervision pursuant to the provisions of Chapter 43, Article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the State Reformatory for Women, or any other facility designed primarily for the imprisonment of adult offenders.

(b) A minor declared delinquent pursuant to the provisions of Chapter 43, Article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the State Reformatory for Women or any other facility designed primarily for the imprisonment of adult offenders, unless he is sixteen years of age, or older, and he is a serious threat to the safety of persons in other facilities."

(6) Neb. Rev. Stat. § 83-185 (Reissue 1971):

"(1) The chief executive officer of each facility shall be responsible for the discipline of those persons committed to the Division of Corrections who reside therein. No person shall be punished except upon the order of the chief executive officer of the facility; nor shall any punishment be imposed otherwise than in accordance with this section.

(2) Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of assault, escape, attempt to escape or other flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in Section 83-1,107 be forfeited or withheld and also that the person be confined in a disciplinary cell. The chief executive officer may order that such person, during all or part of the period in a disciplinary cell, be put on an adequate and healthful diet. A person in a disciplinary cell shall be visited at least once every eight hours. No cruel, inhuman or corporal punishment shall be used on any person.

(3) The chief executive officer shall maintain a record of breaches of discipline, of the disposition of each case, and of the punishment, if any, for each such breach. Each breach of discipline shall be entered in the person's file, together with the disposition or punishment therefor.

(4) The chief executive officer may recommend to the Director of Corrections that a person who is

considered to be incorrigible by reason of frequent intentional breaches of discipline, or who is detrimental to the discipline or the morale of the facility, be transferred to another facility for stricter safekeeping and closer confinement, subject to the provisions of Section 83-176."

(7) Ninth Amendment, United States Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(8) Tenth Amendment, United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

This is a civil rights proceeding under 42 U. S. C. § 1983 commenced by appellees Sell and Konder in the United States District Court for the District of Nebraska against Charles L. Wolff, Jr., former Warden of the Nebraska Penal and Correctional Complex, together with other officers of said Nebraska Penal and Correctional Complex for damages, injunctive relief and a declaratory judgment invoking the jurisdiction of said court under 28 U. S. C. § 1343.

The trial court, the Honorable Chief Judge Warren K. Urbom, first overruled a motion of the defendants to dismiss and later sustained a motion of plaintiffs for a

summary judgment on the ground that there was no genuine issue as to any material fact and that plaintiffs were entitled to judgment as a matter of law.

The case was based upon the permanent confiscation of money from the two plaintiff inmates while inside the walls of the Nebraska Penal and Correctional Complex, U.S. currency being prohibited in the possession of inmates inside the Penal Complex.

The Honorable Judge Urbom ruled on said motion for summary judgment, Filing 16, in his memorandum filed herein on or about February 5, 1976, substantially as follows:

1. That plaintiffs had a possessory interest in the money taken from them.
2. That the defendants could not permanently deprive the plaintiffs of their property without a procedural due process hearing, therefore the state must return the money to the plaintiffs and the burden is on the state to bring any further proceedings; also the burden is upon the state to prove its superior right to the money in such further proceeding.

The U. S. Court of Appeals for the 8th Circuit affirmed on substantially the same reasoning.

The rulings are unreported but are contained in Judge Urbom's memorandum of February 4, 1976, filed February 5, 1976.

The case was submitted upon the original record. This record consists of the pleadings, defendants' answers to plaintiffs' interrogatories, and answers to plaintiffs' requests for admissions, briefs of the parties, including copies

of penitentiary rules attached to defendants' brief in support of the motion to dismiss, and briefs of the parties for and against the motion for summary judgment. There has been no evidence taken.

The facts which may be gleaned from the foregoing record are as follows:

That plaintiff Dennis Sell was searched in September of 1973 by officers of the Nebraska Penal and Correctional Complex who found \$436.00 on the person of Sell while he was an inmate of the Nebraska Penal and Correctional Complex, which money was immediately confiscated and deposited in the Inmate Welfare Fund.

That Edward Konder's locker in the Nebraska Penal and Correctional Complex was also searched in September of 1973 by defendants who found \$40.00 which money was immediately confiscated and placed in the Inmate Welfare Fund.

Both of the foregoing searches were conducted inside the prison on inmates who had been admitted a long time before and had no connection with the search of new inmates on initial admission referred to below.

That the rules and regulations of the Nebraska Penal and Correctional Complex in force at the time require that all newly admitted inmates turn over to the prison authorities all money or valuables in their possession on their initial admission and that they be thoroughly searched to be sure that this has been done. That the inmate is given a receipt, and money is to be forwarded to the records office to be deposited for safekeeping or mailed to a person designated by the inmate. That possession of U. S.

currency, coin or paper, without authorization, inside the Nebraska Penal and Correctional Complex is a violation of the rules and regulations and any contraband found during a search is to be confiscated, recorded and reported back to a supervisory officer. Inmates are permitted to have \$2.50 worth of tickets, color coded. Any tickets not in the current allowable color and any tickets not of the proper color or in excess of \$2.50 will be confiscated, under prison rules, and deposited in the Inmate Welfare Fund.

The answers to requests for admission, particularly number 15, show that in the confiscation of the plaintiffs' money, no hearing nor any proceeding was had at which they may have been successful in having a portion of the money deposited in their personal account.

REASONS FOR ALLOWING THE WRIT

The United States Court of Appeals for the Eighth Circuit has decided an important question of state law, of the United States Constitution, and federal law which has not been, but should be, settled by this Court. That court has also decided this question in a way in conflict with the applicable decisions of this Court, as hereinafter discussed. Because the resolution of this question will have far-reaching effects upon the administration of all the federal and state prisons, jails and all other places where persons are legally incarcerated, it is very important that it be decided by this Court.

Money found in incoming mail is not involved in this case; such money is returned to the sender or credited to the inmate's account, depending on the circumstances. All that is involved here is money or other contraband discovered as a result of a search of an inmate inside the prison.

Money inside a prison can be worse than a bomb, guns, knives, narcotics or any of the other items which are generally accepted as prohibited items in a prison. Money may not only purchase any of those items inside the prison, but it may also be used from within to hire an assassin, perfect an escape, or accomplish other illegal activities outside the prison as well. Money in the hands of inmates can be used to corrupt prison personnel and generally disrupt the maintenance of discipline and security.

Yet, apparently because money may be legally used by the inmate when he returns to society, the lower courts have had difficulty in embracing the idea that an inmate caught with money inside the walls should lose it permanently even though these same judges would apparently have no problem with dynamite, guns, knives, narcotics or gasoline which may also have a legal use or market value to the inmate on the outside.

Punishment of the inmate in forms other than permanent confiscation of the money does not solve the problem. Persons on the outside who would put up money to be smuggled in would often reconsider if they knew the money would be permanently confiscated if found. On the other hand, if the only consequence if caught, as far as the money is concerned, is that it is credited to the inmate's account,

there is no financial risk at all. Whether or not the inmate is punished otherwise would have no bearing at all on persons on the outside—obviously if the inmate is demanding the money to be sent in, he is not letting the risk of other punishment restrain him. Why then, should the outside source hold back? The surest answer is that he will lose his money if caught!

Both the federal district court and the Court of Appeals for the Eighth Circuit took the position that once the inmate got possession of the money inside the walls, even though illegally and with no legal use, that he had acquired a property right (without citation of any applicable legal authority) and that such could not be forfeited, at least without a statute, (again no citation of applicable authority) for to do so would violate the Fourteenth Amendment due process.

The problem with this reasoning is that it recognizes a constitutional right in a legally convicted prisoner to possession in a penitentiary of the single most dangerous article of personal property in a setting for which money has absolutely no legal use.

The Court of Appeals, in affirming this case, has completely rejected the recent cases from this court as to the constitutional rights taken from a person for the term of his sentence at the time he is constitutionally tried and sentenced to a prison.

This Court in *Meachum v. Fano*, — U. S. —, 49 L. Ed. 2d 451 (June 25, 1976), held that the transfer of inmates from a medium security prison to a maximum security prison for alleged but unproved violations of prison rules

did not infringe any constitutional rights of the prisoners entitling them to a due process hearing. There, the Court pointed out that the procedural due process requirements of *Wolff v. McDonnell*, 418 U. S. 539, were grounded in Nebraska statutes giving prisoners the *right* to good time credits which could only be lost for serious misconduct but, that without a right, the Fourteenth Amendment does not come into play. The honorable federal district court in the present case made a conclusion of law, which the United States Court of Appeals for the Eighth Circuit accepted, that under Nebraska law the inmates' possession of the currency gave them a possessory interest in the money and therefore "property" within the meaning of the Fourteenth Amendment—giving them a right to defend against anyone not having a superior title. This conclusion was reached by the honorable federal district court on the basis of property cases having no relation to persons legally convicted and sentenced for crimes. We respectfully submit that there is absolutely no Nebraska law, case or statutory, concerning property rights of convicted inmates inside a prison. Such a conclusion, as reached by the courts below, leads to a paradoxical situation indeed: A person may be constitutionally convicted and sentenced to a prison in which he has absolutely no right to possess certain prohibited items because they are contrary to all the purposes of imprisonment and have no single legal use therein, but he may nevertheless somehow acquire a "property" right if he is, illegally, surreptitiously and corruptly, able to come into possession thereof inside the walls. This, even, in the face of the Nebraska statute, § 83-417, Neb. Rev. Stat. (Reissue 1971), making it a felony to convey, without

approval of the chief executive officer, any article to or from a committed offender.

As Massachusetts law in *Meachum v. Fano, supra*, conferred no right on the prisoner to remain in the prison to which he was initially assigned, so no Nebraska law gives a prisoner any right to possess money inside a penitentiary. As in *Meachum v. Fano, supra*, where it was held that it was not necessary to prove misconduct by procedural due process prior to the transfer since there was no constitutional right to remain, so in the present case there should be no requirement of procedural due process to prove *how* the inmate acquired possession of the money, since he has no constitutional right to such possession in any case.

Here, as concluded in *Meachum v. Fano, supra*, at 461:

“ . . . Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause. The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States. . . . ”

The number of civil rights cases that the rule of this case would trigger throughout the country, diverting state personnel further from society's goals, staggers the imagination. Every knife or razor blade may trigger a complaint—either at the time of confiscation or sometime later if a warehouse receipt is not duly delivered to the inmate. The same conclusion as *Fano* was reached in its companion

case, *Montanye v. Haymes*, — U. S. —, 49 L. Ed. 2d 466. As pointed out in *Meachum v. Fano, supra*, said cases were consistent with previous approaches in *Goss v. Lopez*, 419 U. S. 565, *Board of Regents v. Roth*, 408 U. S. 564, and others. Of *Board of Regents v. Roth, supra*, this Court stated as to the question of the existence of a property right, which surely had much more going for it than the question involved in the present case, that:

“ . . . We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. In *Board of Regents v. Roth*, 408 U. S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), a university professor was deprived of his job, a loss which was surely a matter of great substance, but because the professor had no property interest in his position, due process procedures were not required in connection with his dismissal. We there held that the determining factor is the nature of the interest involved rather than its weight. . . . ” (49 L. Ed. 2d 451, 458.)

The statutes of Nebraska, like those involved in *Meachum v. Fano* and *Montanye v. Haymes, supra*, were not designed to provide a new inmate to any specific facility nor to have a right to possession of any particular personal property within a facility. Section 83-173, Neb. Rev. Stat. (Reissue 1971), set forth in full, *supra*, (the same in this regard since 1969), provides in part as follows:

“The Director of Correctional Services shall:

“(1) Supervise and be responsible for the administration of the Department of Correctional Services;

“ ”

"(3) Establish and administer policies and programs for the operation of the facilities in the department and for the custody, control, safety, correction and rehabilitation of persons committed to the division;

". . . .

"(6) Make rules and regulations for the management, correctional treatment and rehabilitation of persons committed to the division, the administration of the facilities, and the conduct of officers and employees under his jurisdiction. . . ."

In carrying out the criminal sentences of the state courts confining felons to prison, the prison authorities have a primary responsibility of confining those prisoners in a secure manner to themselves and others and in protecting the outside public. In carrying out this primary responsibility the prison officials, through years of experience, have deemed that certain items of personal property are safe to permit within the penitentiary. By the same learning, the prison officials have deemed that other items, including U. S. currency, are so dangerous and destructive of the primary responsibility of the penitentiary, that they must be surrendered upon entrance of the inmate and placed in safekeeping for return to the inmate or his designate.

The Court of Appeals in the present case indicated by *obiter dictum* that if Nebraska had a specific statute on forfeiture, it might be proper for the authorities under the present circumstances to permanently confiscate money provided adequate procedural due process safeguards were followed. In *Wolff v. McDonnell*, *supra*, on prison discipline, this Court stated:

"We do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges." (481 U. S. at 572, n. 19.)

The court again reached the same conclusion in *Baxter v. Palmigiano* (decided April 20, 1976), — U. S. —, 47 L. Ed. 2d 810, 96 S. Ct. —.

If a prison inmate is not entitled to a due process hearing for the removal of privileges, how can it be said that he is entitled to a due process hearing for the removal of items of contraband which he has not acquired as a privilege but in direct violation of prison rules. Such reasoning is patently fallacious and an unwarranted invasion of the rights reserved to the states.

It further ignores the regulatory powers already given the Director of Corrections, as illustrated in the above state statutes, and the regulations duly enacted thereunder; however, the state trial courts rely on these regulations and statutes when passing sentence.

Respectfully submitted,

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A. 1

APPENDIX I.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 76-1307

DENNIS SELL and EDWARD KONDER,
Appellees,

vs.

**ROBERT F. PARRATT, Warden, Nebraska Penal and
Correctional Complex; JOSEPH VITEK, Director, Ne-
braska Department of Correctional Services; CAPTAIN
DAVID WATSON; CAPTAIN NANCE; and OFFICER
AKINS,**
Appellants.

Appeal from the United States District Court
for the District of Nebraska.

Submitted: November 10, 1976

Filed: February 2, 1977

Before GIBSON, Chief Judge, VAN OOSTERHOUT,
Senior Circuit Judge, and HENLEY, Circuit Judge.

HENLEY, Circuit Judge.

In September, 1973 Dennis Sell and Edward Konder, plaintiffs in the district court, were inmates of the Nebraska Penal and Correctional Complex and were in the

A. 2

immediate custody of the Warden of that institution who is a subordinate of the Director of the Nebraska Department of Correctional Services.¹ During that month subordinate prison personnel found Sell to be in possession of \$463.00 in United States currency, and plaintiff Konder was found to have \$40.00 concealed in his locker. Pursuant to prison rules and regulations, the money was immediately seized and summarily confiscated without hearing and was deposited in the Inmates Welfare Fund of the prison.

Additionally, Sell had good time taken away from him and was changed in status from a minimum custody inmate to a medium custody inmate. Konder was required to spend a period of time in a disciplinary cell. Apparently, neither plaintiff was afforded a hearing with respect to the punishment imposed upon him, including the seizure and confiscation of the money that was found in his possession.

In 1974, Sell and Konder commenced this action in the United States District Court for the District of Nebraska seeking return of the moneys in question and for appropriate declaratory and injunctive relief. The defendants were the Warden, the Acting Director of the Department, and the subordinate prison employees who had effected the actual seizures. Subject matter jurisdiction

¹ In 1973 and 1974 Charles L. Wolff, Jr. was Warden of the Complex; he has been succeeded in office by appellant Robert F. Parratt, the present Warden. When the suit was filed in 1974 Don Best was the Acting Director of the Department; he has since been succeeded by Director Joseph Vitek, who appears here as an appellant.

A. 3

was predicated upon 28 U.S.C. § 1343 and 43 U.S.C. § 1983. Plaintiffs also invoked the pendent jurisdiction of the district court.

While the defendants denied that they had deprived the plaintiffs of any property without due process of law and contended that the rules and regulations under which they operated were valid, they admitted the factual allegations of the complaint, acceded to a number of requests for admissions propounded by plaintiffs and answered interrogatories in a manner favorable to the plaintiffs. The defendants propounded interrogatories to the plaintiffs inquiring as to the source of the moneys and as to the circumstances in which the moneys were acquired. Plaintiffs objected to those interrogatories and ultimately their objections were sustained by the district court.²

On July 30, 1975 plaintiffs moved for summary judgment pursuant to Fed. R. Civ. P. 56. In February, 1976 the district court filed a thorough memorandum opinion and entered an order granting the motion. The district court adjudged that the money taken from Sell be returned to him, and that the money taken from Konder be credited to his account on the prison books to be returned to him upon his release from prison.³

² The Honorable Warren K. Urbom, Chief United States District Judge.

³ Affidavits from the respective plaintiffs which accompanied their motion indicate that as of July 30, 1975, Sell had been paroled, had served his parole period, and had been discharged from parole custody. As of that time Konder was at liberty on parole. In view of the language of the order of the district court, it appears that Konder was later returned to the Complex.

A. 4

For reversal, the defendants contend, as they contended in the district court, that the prison rules under which the two sums of money were seized and confiscated were reasonable and valid rules, that "free world money" in the hands of Nebraska convicts is contraband, and that plaintiffs had no property rights in the money which came under the protection of the fourteenth amendment. As indicated, the district court rejected those contentions. We affirm.

There is no dispute about the facts of the case, which have been outlined already, nor is there any dispute about the provisions of relevant Nebraska statutes or about the prison rules and regulations under which the defendants, including the subordinate prison employees, acted.

The Nebraska prison system consists of a number of facilities under the jurisdiction of the Department of Correctional Services, which is administered by a Director. Each of those facilities, including the Penal and Correctional Complex, is under the immediate control of a Warden, and he, of course, has a number of subordinate employees with different ranks and duties.

R. S. Neb. § 83-173 provides that the Director shall, among other things: (1) Supervise and be responsible for the administration of the Department. (2) Establish and administer policies and programs for the institutions under his control and for the custody, control, safety, correction and rehabilitation of inmates of the several institutions subject to his jurisdiction. (3) Appoint and remove the chief executive officer of each institution and subordinate employees and delegate to them appropriate powers and duties. (4) Make rules and regulations for

A. 5

the management, correctional treatment and rehabilitation of inmates and for the administration of facilities and the conduct of officers and employees under his jurisdiction.

R. S. Neb. § 83-185 relates to the punishment of inmates for infractions of prison rules. Insofar as here pertinent, the section is as follows:

(1) The chief executive officer of each facility shall be responsible for the discipline of those persons committed to the Division of Corrections who reside therein. No person shall be punished except upon the order of the chief executive officer of the facility; nor shall any punishment be imposed otherwise than in accordance with this section.

(2) Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in section 83-1,107 be forfeited or withheld and also that the person be confined in a disciplinary cell. The chief executive officer may order that such person, during all or part of the period in a disciplinary cell, be put on an adequate and healthful diet. A person in a disciplinary cell shall be visited at least once every eight hours. No cruel, inhuman or corporal punishment shall be used on any person.

(3) The chief executive officer shall maintain a record of breaches of discipline, of the disposition of each case, and of the punishment, if any, for each such breach. Each breach of discipline shall be entered in the person's file, together with the disposition or punishment therefor.

R. S. Neb. § 83-417 is as follows:

If any person employed at the Nebraska Penal and Correctional Complex, in any capacity, shall

A. 6

willfully and negligently suffer any prisoner to go at large, or be visited, conversed with, comforted or relieved within the prison, or shall convey to or from any prisoner any communication, newspapers, matches or any article without the approbation of the warden, he shall upon conviction thereof be punished by a fine not exceeding one thousand dollars or by imprisonment in the Nebraska Penal and Correctional Complex not exceeding ten years.

And R. S. Neb. § 28-201 provides that whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as though he were the principal offender.

The record reflects that when an individual is committed to the Complex and is received thereat, he is thoroughly searched and is required to turn over items of personal property, including money, to prison personnel. He is given a receipt for such items, and presumably they are returned to him when he is released from the institution. If an inmate with money in his possession desires to have it transmitted to a third person in the civilian world, that will be done.

While an inmate is confined in the institution, he is not permitted to have money in his possession in any circumstances, or directly and personally to receive money from others. His day-to-day commissary needs may be met by means of color coded scrip which is issued by the institution and which an inmate may possess in limited amounts.

If an inmate is found in possession of money, he is deemed guilty of a serious disciplinary offense and may be severely punished. In addition, the money found in

A. 7

his possession is summarily taken away from him and is confiscated in the sense that it is deposited in the Inmates Welfare Fund which is a fund maintained for the benefit and welfare of all inmates. Once money taken from an inmate is placed in the Welfare Fund, it is lost to him as effectively as though it had been paid over into the general state treasury, and although the inmate may derive some benefit from the Fund as an inmate, that benefit is not directly connected with the particular money that was taken from him and placed in the Fund.

When money is found in the possession of an inmate, the seizure and confiscation of it are both summary and final and are not subject to later administrative review. Although the inmate may be afforded a hearing in connection with the final disposition of the disciplinary charge against him, and in the course of it may be called upon or given an opportunity to explain how he came to be in possession of the money, there is no way in which he can retrieve the money, either immediately or ultimately, from the Welfare Fund. As far as the inmate is concerned, the money is simply lost.

In the course of the discovery proceedings it was admitted by the defendants that the confiscation of free world money found in the possession of an inmate is punitive in nature and is in addition to other punishments that may be imposed upon the inmate on account of his having been in possession of the money in the first place.

Let it be made clear at the outset of discussion that no one questions the right of a state to forbid its convicts to have money in their possession while undergoing con-

finement and may take away from them money that is found in their possession. In this connection in *Holt v. Hutto*, 363 F. Supp. 194, 210 (E. D. Ark. 1973), *rev'd on other grounds*, *Finney v. Arkansas Board of Correction*, 505 F. 2d 194 (8th Cir. 1974), the district court said:

... It has long been prison policy to prohibit inmates from having in their possession what is called "free world" or "green" money. The reasons for the prohibition are obvious. An inmate with currency in his possession may be the subject of attack by other inmates; the inmate with funds is in a better position to escape than an inmate who has no money; the money in the possession of an inmate may be used to bribe guards or other prison employees.

That right of the state was expressly recognized by the district court in the instant case and is not involved here. The question is whether those in charge of the Nebraska penal system can lawfully and constitutionally deprive an inmate permanently of money found in his possession regardless of its source and regardless of the circumstances of the possession. In the course of its opinion the district court said:

Much of the state's argument relates to the power of the Penal Complex to remove the money from a prisoner in the first place. I have not doubted that the Penal Complex can remove such money. Some very valid state interests are served by not allowing prisoners to keep money on their person while they are in prison. But the state's keeping it permanently or giving it away is quite another matter.

In deciding the case the district court first addressed itself to the question of whether at the time of the seizure the respective plaintiffs had such an interest in the mon-

eys seized as would amount to "property rights" protected by the fourteenth amendment.

Citing *Board of Regents v. Roth*, 408 U. S. 564 (1972), and *Mitchell v. W. T. Grant Co.*, 416 U. S. 600 (1974), the district court held that the question of whether plaintiffs' interest in the moneys constituted "property" shall be determined by reference to Nebraska law. The district court concluded that under Nebraska law the plaintiffs' possession of the currency gave them at least a possessory interest in it on the basis of which they could defend their possession against the claim of anyone not having a superior right or title, and the district court also concluded that this possessory interest was "property" within the meaning of the fourteenth amendment.

We accept the conclusion of the experienced district judge on the question of Nebraska law, and we also agree with him that if the interests of the plaintiffs in the money amounted to "property," as the district judge held that it did, that property would ordinarily fall within the protection of the fourteenth amendment.

The district court next concluded that plaintiffs were entitled to invoke the protection of the amendment in this action notwithstanding the fact that they were convicts and notwithstanding the fact that the moneys had been taken from them by prison officials purporting to act under rules and regulations for the proper governance of the prison and the inmates thereof.

In so holding, the district court took note of *Kimble v. State of Michigan Correction Department*, 300 F. Supp. 1122 (E. D. Mich. 1968), *aff'd*, 411 F. 2d 990 (6th Cir. 1969), and *Howard v. Swenson*, 426 F. 2d 277 (8th Cir.

1970), cited by counsel for the defendants. The district court was of the opinion that the "hands off" policy expressed in those cases is no longer valid in the light of decisions of the Supreme Court in *Haines v. Kerner*, 404 U.S. 519 (1972), and *Wolff v. McDonnell*, 418 U.S. 539 (1974).

In *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), the Supreme Court rejected the idea that there is any distinction, as far as suits under § 1983 are concerned, between personal liberties and proprietary rights. In *Cruz v. Cardwell*, 486 F.2d 550, 551 (8th Cir. 1973), we applied *Lynch, supra*, to uphold a civil rights complaint filed by an individual who claimed that a local sheriff had wrongfully failed to return to him money that the sheriff had taken when the plaintiff was arrested. See also *Sigler v. Lowrie*, 404 F.2d 659 (8th Cir. 1969). Recent cases from other circuits holding that convicts may invoke § 1983 in cases involving property rights include *Hansen v. May*, 502 F.2d 728 (9th Cir. 1974), and *Russell v. Bodner*, 489 F.2d 280 (3rd Cir. 1973).

Defendants contend that the cases just cited are distinguishable from this case in that in those cases the property involved rightfully belonged to or was rightfully in possession of the individual plaintiffs when it was taken away from them or not returned to them. As to the instant case, defendants say that the moneys taken from the plaintiffs were contraband, that plaintiffs' possession of the funds was unlawful, and that they had no property rights in them. We reject that argument.

It is familiar law that possession of property is of two kinds, actual and constructive. Granting that the

prison authorities had the right to deprive the plaintiffs of the immediate actual possession and enjoyment of the funds in question, the exercise of that right did not necessarily destroy the right of the plaintiffs to have the funds deposited to their accounts on the prison books or held for ultimate return to them and thus remain in their constructive possession. And the assertion by the defendants that they had a right not only to take the moneys away from plaintiffs temporarily but also to confiscate them permanently is what brought about this lawsuit.

Having determined that the plaintiffs had a property right in the moneys taken from them, and that they could seek to vindicate that right in this proceeding, the district court proceeded to a consideration of the ultimate question of the validity of the permanent confiscation of the sums involved in the case.

The district court held that the confiscation was punitive in nature and amounted to a forfeiture, a proceeding which is not favored by the law. It also held that a forfeiture requires statutory authority and that the Nebraska statutes which have been mentioned do not authorize any forfeiture of property as a punishment of inmates of the Complex who violate prison rules or who may be involved one way or another in a violation of § 83-417.⁴ And on the basis of those holdings the district court concluded that the confiscations could not be sustained, and

⁴ It is doubtful that § 83-417 was designed to reach to transactions between or among inmates. The principal purpose of the statute was to prohibit improper communications and dealings between civilians, on the one hand, and inmates, on the other.

that the moneys would have to be returned to the plaintiffs.⁵

We think that the district court without reaching the federal constitutional question raised by the plaintiffs might well have based its decision on the proposition that simply as a matter of Nebraska law an administrative agency of the state, like the Department of Correctional Services, may not forfeit property used or possessed in violation of agency rules and regulations unless the power to effect such a forfeiture is expressly, or at least by fair implication, conferred by the statutes of the state, and that in the absence of statutory authority the Department had no authority to confiscate permanently the currency that was taken from the plaintiffs.

It seems, however, that the district court was of the opinion that a forfeiture or confiscation of the kind involved here is violative of due process of law unless authorized by statute. In support of its view the district court cited the following cases: *United States v. One Ford Coach*, 307 U. S. 219 (1939); *United States v. Lane Motor Co.*, 199 F. 2d 495 (10th Cir. 1952), *aff'd*, 344 U. S. 630 (1953); *United States v. Charles D. Kaier Co.*, 61 F. 2d 160 (3d Cir. 1932); and *King v. United States*, 292 F. Supp. 767 (D. Colo. 1968), a case that involved a controversy about the rifle with which President Kennedy was assassinated.

⁵ In this view of the case it was irrelevant where or how the plaintiffs obtained the moneys, and it was evidently on this basis that the district court sustained the plaintiffs' objections to the defendants' interrogatories which sought to obtain information in that area.

Speaking of the underlying authority for forfeitures in the United States the district court in *King, supra*, had this to say (292 F. Supp. at 772):

Forfeiture is quite different from condemnation in that the latter requires the payment of just compensation. *United States v. One 1962 Ford Thunderbird*, 232 F. Supp. 1019, 1022 (N. D. Ill. 1964), and 37 C. J. S. Forfeiture § 4.

Although there may be such a thing as judicial forfeiture, it does not occur until there has been a conviction and the court has decreed that the property of the person convicted is forfeited to the government. Furthermore, such a remedy would obtain only in respect to instruments of the crime and perhaps contraband. See 37 C. J. S. Forfeiture § 1 et seq.; 3 A. L. R. 2d 738, §§ 1-2.

Statutory forfeiture on the other hand is a civil action which becomes effective as of the date of the act prohibited by the statute. *United States v. Stowell*, 133 U. S. 1, 16-17, 10 S. Ct. 244, 33 L. Ed. 555 (1890). A conviction is not a prerequisite. Judicial forfeiture has had little acceptance in the United States, and it is generally held that the remedy must be through statutory proceedings. [Footnote omitted.]

Thus, in *United States v. Lane Motor Co.*, 199 F. 2d 495 (1952), *aff'd*, 344 U. S. 630, 73 S. Ct. 459, 97 L. Ed. 622, the Court of Appeals for the Tenth Circuit said:

Proceedings of this kind instituted by the United States for the forfeiture of property are essentially statutory proceedings, and they cannot be maintained unless authorized by an applicable statute. *United States v. Charles D. Kaier Co.*, 3 Cir., 61 F. 2d 160.

199 F. 2d at 496-497.

This case does not present any question of "judicial forfeiture." With regard to statutory forfeitures the Supreme Court in *United States v. One Ford Coach, supra*, 307 U. S. at 226, said that forfeitures are not favored and "should be enforced only when within both letter and spirit of the law."

In view of the cases that have been cited we think that the district court correctly held that an administrative agency has no right without underlying statutory authority to prescribe and enforce forfeitures of property as punitive measures for violations of administrative rules and regulations, and that when an agency does so, it violates the due process clause of the fourteenth amendment.

It may be argued with a good deal of force that in the case of convicts a mere temporary separation of a convict from money in his possession and a conventional disciplinary punishment for having possessed the money in violation of prison rules are not sufficient sanctions to deter prison inmates from seeking to acquire and enjoy money while in confinement. And we do not hold that a state legislature may not constitutionally provide by statute that such money shall be permanently confiscated, provided that the forfeiture proceedings are surrounded by adequate procedural safeguards, and provided that inmates who are found with money in their possession are given some opportunity to justify their possession notwithstanding their apparent violation of prison rules.

The judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX II.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CV 74-L-63

DENNIS SELL and EDWARD KONDER,

Plaintiffs,

vs.

CHARLES L. WOLFF, JR., Warden, Nebraska Penal and Correctional Complex; DON BEST, Acting Director, Department of Corrections, State of Nebraska; CAPTAIN DAVID WATSON; CAPTAIN NANCE; OFFICER AKINS,

Defendants.

MEMORANDUM ON MOTION FOR SUMMARY JUDGMENT

(Filed February 5, 1976)

APPEARANCES: For plaintiffs, Alan Saltzman

For defendants, Mel Kammerlohr,
Assistant Attorney General

URBOM, Chief Judge

Dennis Sell, formerly an inmate at the Nebraska Penal and Correctional Complex and now discharged, and Edward Konder, an inmate at the Nebraska Penal and Correctional Complex, have filed a petition under the Civil Rights Act, 42 U. S. C. § 1983. They allege that prison authorities took \$436.00 from the person of Dennis Sell and \$40.00 from the locker of Edward Konder and deposited the money in the Inmates Welfare Fund. The plaintiffs claim these actions have permanently deprived them of their property without due process of law. The

plaintiff Sell seeks return of this money now and the plaintiff Konder seeks to have the money credited to his inmate account for return to him upon his parole or release.

The matter is now before the court on the plaintiffs' motion for summary judgment, filing 16. Oral argument was heard on this motion on October 14, 1975. The defendants have filed a response brief and a motion to compel answers to interrogatories, filing 19.

I. IS THE PLAINTIFFS' INTEREST IN THE MONEY SUFFICIENT TO INVOKE THE DUE PROCESS PROTECTIONS OF THE FOURTEENTH AMENDMENT?

The defendants admit in their answer that the money was taken from the plaintiffs' possession. It is thus undisputed that the plaintiffs had at least a possessory interest in the money.

"Property" has been defined broadly in the context of the Fourteenth Amendment. The United States Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), dealing with the property rights of a nontenured professor, said:

" 'Liberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' . . . For that reason, the Court has fully and finally rejected the

wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. . . ."

408 U.S. at 571-72

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly* [397 U.S. 254 (1970)] had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. . . ."

408 U.S. at 577

Mitchell v. W. T. Grant, 416 U.S. 600 (1974), is in accord, holding in a suit challenging a writ of sequestration that both the seller and buyer had current interests in the property under state law, and that fact was significant to the court in determining appropriate due process procedures.

Thus, I am obligated to make an examination of the state law of Nebraska to determine if and to what degree Nebraska recognizes a property interest in the possessor of goods. I have found three areas conferring rights on possessors:

(1) A possessory interest is sufficient to maintain an action in replevin against all except the person who can prove a superior interest. *Fitzsimons v. Frey*, 153 Neb. 550, 45 N.W.2d 602 (1951).

(2) A possessory interest cannot be interrupted by an officer acting under color of official authority unless the state can show a superior right of some kind. *Barkley v. Leiter*, 49 Neb. 123, 68 N.W. 381 (1896), involved a sheriff's seizure of goods, apparently for the nonpayment of an auctioneering tax. It was undisputed that the plaintiff had been in possession at the time of the seizure. The sheriff claimed that the plaintiff by possessing the property had been covering for the real owner and thus sheltering him from the tax due. The distress warrant seize the goods had been lost. The court said:

"It devolved upon the adverse parties [the state] to show that this possession was interrupted by virtue of a superior right of some kind."

and this could not be done because the warrant could not be found. Thus, even though the taking was pursuant to statute, the state could not prove that proper procedures were followed and the court awarded possession to the plaintiff. In an annotation, "Mere Possession as Basis of Action," 150 A.L.R. 163, 253 (1944), the author states the basis for this rule and the related rule in (1) above:

"In the last analysis, the rule is punitive. Judges look upon the seizing of property in another's possession as prima facie an act of lawlessness, of which the disseizor will not be permitted to take advantage unless he can justify it under a perfect title."

(3) A finder of chattels also acquires a special property interest in the goods found. Vol. 36A C.J.S. "Finding Lost Goods," § 5, states:

"By the general rule of the common law one who finds and appropriates a lost chattel . . . acquires the

title thereto and the right to possession thereof against all the world except the true owner."

The probability is that the rule obtains in Nebraska.

I would conclude that Nebraska does recognize an identifiable property interest in one who is a mere possessor of that property. It is from this determination of the broad notions of property that the due process clause protects that I conclude that mere possession of property does create an interest sufficient to invoke the protections of the due process clause of the Fourteenth Amendment.

II. ARE A PRISONER'S PROPERTY RIGHTS SUBJECT TO PROTECTION IN THE CONTEXT OF A CIVIL RIGHTS SUIT?

Since *Lynch v. Household Finance*, 405 U.S. 538 (1972), there can be no argument that deprivation of mere property rights is not actionable under 42 U.S.C. § 1983.

The defendants, however, cite two prison cases for the proposition that the plaintiffs' case is "legally frivolous." The first of these is *Kimble v. State of Michigan Correction Department*, 300 F.Supp. 1122 (U.S.D.C. E.D. Mich. 1968), aff'd sub nom. 411 F.2d 990 (C.A. 6th Cir. 1969). There, guards took some \$350.00 from a prisoner, allegedly earned by him in selling contraband drugs. A disciplinary hearing was held at which the prisoner was found guilty and the money was ordered turned over to the "General Benefit Fund," similar to the Inmates Welfare Fund here. (No hearing was conducted in the instant case.) The district court ruled that this was a

properly regulated function of the administration of a prison, that the courts give wide discretion to prison officials in this area, and that federal courts are not in the business of supervising prisons of the state. The defendants here also cite *Howard v. Swenson*, 426 F.2d 277 (C. A. 8th Cir. 1970), wherein "appellant . . . is attempting to make a federal case over 'several pairs of black low-cut civilian shoes.'" The Eighth Circuit affirmed a lower court dismissal, citing *Kimble* and other cases for the proposition that "[e]xcept in extreme cases, courts may not interfere with the conduct of a prison, with prison regulations and with disciplinary action by prison authorities."

The policy statement of these cases simply does not represent the state of the law today. The plaintiffs point to language in *Haines v. Kerner*, 404 U.S. 519 (1972), and *Wolff v. McDonnell*, 418 U.S. 539 (1974). The latter case notes at 418 U.S. 555-56:

" . . . But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. . . . Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law. . . ."

In this regard, "Recent Developments in Correctional Case Law," South Carolina Department of Corrections, 1975, states at page 65:

"Thereafter [after *Lynch v. Household Finance*, 405 U.S. 538 (1972), which held that deprivation of prop-

erty stated a claim under § 1983], courts have been allowing recovery for theft and confiscation of personal property by guards."

Cited for this proposition were *Hansen v. May*, 502 F.2d 728 (C. A. 9th Cir. 1974), where only half of an inmate's personal property was returned after a stay in solitary confinement; *Russell v. Bodner*, 489 F.2d 280 (C. A. 3rd Cir. 1973), involving a guard's taunting confiscation of an inmate's cigarettes; *Lathan v. Oswald*, 359 F.Supp. 85 (U. S. D. C. S. D. N. Y. 1973), involving the guards' theft of some \$400 of personal property from an inmate's cell; and *Schumate v. People of the State of New York*, 373 F.Supp. 1166 (U. S. D. C. S. D. N. Y. 1974), where personal property valued at \$500 was not returned to an inmate upon being transferred. *Cruz v. Cardwell*, 486 F.2d 550 (C. A. 8th Cir. 1973), holding that a cause of action is stated for an alleged taking of \$206 from the plaintiff at the time of his arrest and not subsequently returning it to him, is also supportive of this proposition. So too is *Sigler v. Lowrie*, 404 F.2d 659 (C. A. 8th Cir. 1968), involving an attempt to assess a prisoner the costs of his return to the penal complex following his escape. This assessment was approved to the extent that it was taken from his spending account, statutorily described as being totally discretionary with the warden and never attaining a vested character. However, the court said that it agreed that to fine a prisoner as a penalty for escape and thereby summarily take from him *vested* monies in order to pay the fine would be a violation of due process.

I conclude that the policy statements of *Kimble* and *Howard*, *supra*, simply are not proper statements of the

law. Furthermore, *Howard* can today be said to stand more for a finding that certain civil rights actions involve de minimus damage claims than it does for its statement of noninterference with the conduct of prison authorities. The status of the plaintiffs as prisoners does not negate the due process protections here.

Much of the state's argument relates to the power of the Penal Complex to remove the money from a prisoner in the first place. I have not doubted that the Penal Complex can remove such money. Some very valid state interests are served by not allowing prisoners to keep money on their person while they are in prison. But the state's keeping it permanently or giving it away is quite another matter.

III. Has the state complied with due process?

It is admitted that the state has permanently deprived the plaintiffs of their interest in this money and that no hearing accompanied this deprivation. I have determined that the plaintiffs, as prisoners at the time of the taking, have a right to challenge this taking under 42 U. S. C. § 1983 and that their possessory interest in the property is sufficient to invoke due process protections.

The taking here takes the form of a forfeiture. *In re Escheat of Monies Deposited in U. S. District Court for the Eastern District of Pennsylvania*, 187 F. 2d 131, 132 (C. A. 3rd Cir. 1951), defines forfeiture from the language of *Ballentine's Law Dictionary* as "the divestiture of property without compensation in consequence of an offense. The effect of such a forfeiture is to transfer the title to the specific thing from the owner to the sovereign power." It is by nature a quasi-criminal proceeding. *One 1958 Plymouth Sedan v. Comm. of Pennsylvania*, 380 U. S. 693

(1965); *Compton v. United States*, 377 F. 2d 408 (C. A. 8th Cir. 1967). Indeed, many of the protections applicable in criminal proceedings are also applicable to forfeiture. *Boyd v. United States*, 116 U. S. 616 (1886); *United States v. United States Coin & Currency*, 401 U. S. 715 (1971).

To the extent that the prison authorities took the plaintiffs' money as a form of punishment, this is a forfeiture. The defendant Charles L. Wolff, Jr. has admitted the sixteen items requested by the plaintiffs to be admitted. Among these are:

"(6) That in addition to the *punishment of confiscation* of money found on or under the control of an inmate within the institution, current policy allows for the forfeiture of good time or placement in the adjustment center as punishment for possession or control of money by an inmate within the institution." (Emphasis added.)

Furthermore, the defendants have admitted all factual allegations of the plaintiffs' complaint. These include:

"(10) *The confiscation and forfeiture* of plaintiff Dennis Sell's money was *punishment* imposed in addition to loss of good time and transfer from minimum to medium security. *The confiscation and forfeiture* of plaintiff Edward Konder's money was *punishment* imposed in addition to the punishment of being confined in a disciplinary cell of the Adjustment Center. . . ." (Emphasis added.)

Thus, I would conclude that this taking was intended as punishment and therefore must be analyzed in terms of forfeiture proceeding requirements.

Forfeitures are not favored in law and generally require specific statutory authority. *United States v.*

Charles D. Kaier Co., 61 F. 2d 160 (C. A. 3rd Cir. 1932); *United States v. Lane Motor Co.*, 199 F. 2d 495 (C. A. 10th Cir. 1952), *aff'd* 344 U. S. 630 (1953); *King v. United States*, 292 F. Supp. 767 (U. S. D. C. Colo. 1968). See also *United States v. One Ford Coach*, 307 U. S. 219 (1939). The *King* case notes at 292 F. Supp. 772 that whatever may be left of the doctrine of judicial forfeiture, it is required that a conviction first be obtained in a court of law before such a forfeiture can be had. There has been no conviction in the instant case. Thus, any authority for the forfeiture here must be statutory.

The defendant Warden Wolff states in his answers to plaintiffs' interrogatories that this taking was carried out as a matter of institutional policy and that it is statutorily supported by §§ 83-417, 83-173 and 83-185 of the Nebraska statutes.

The defendants have attached copies of the institutional regulations to their brief in support of a previously denied motion to dismiss. Even if these regulations were in evidence, they could not provide authority for the permanent deprivation of property here, because forfeitures require *statutory* authorization.

Section 83-417 directs:

"A person shall be guilty of a felony if he purposely or knowingly . . . conveys to . . . any committed offender any . . . article. . . ."

Section 83-173 states that the Director of Correctional Services shall:

"(6) Make rules and regulations for the management, correctional treatment and rehabilitation of persons committed to the department . . .

• • •

"(11) Exercise all powers and perform all duties necessary and proper in carrying out his responsibilities."

Section 83-185 declares:

"(1) The chief executive officer of each facility shall be responsible for the discipline of those persons committed to the Division of Corrections who reside therein. No person shall be punished except upon the order of the chief executive officer of the facility; nor shall any punishment be imposed otherwise than in accordance with this section.

"(2) Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in Section 83-1, 107 be forfeited or withheld and also that the person be confined in a disciplinary cell."

Wolff v. McDonnell, *supra*, now requires that these latter two punishments be accompanied by due process hearings.

These statutes do not provide any statutory authority for a forfeiture. Indeed, § 83-185 indicates that to impose any sort of punishment other than those listed is beyond the statutory authority of the Penal Complex. A forfeiture is such a punishment.

I thus am unable to find any statutory authority for the defendants' actions here. Forfeiture proceedings require such authority in the absence of a conviction for obtaining or having the items of property.

IV. REMEDY

The plaintiffs have not been afforded any hearing whatsoever. I thus hold that their due process rights under the Fourteenth Amendment have been violated. The only question remaining is that of remedy. Three options appear:

- (1) Direct that the plaintiffs are the owners of the property and order the defendants to return the property to them;
- (2) Return the plaintiffs to possession only, but place the burden on the state to bring any further proceedings and to prove its superior right in the money; or
- (3) Order that a hearing be given by the state at which the plaintiffs would have an opportunity to prove ownership in the money, and failure by the plaintiffs would entitle the state to keep the money.

I reject the first option, because it might grant to the plaintiffs something more than they have previously had. I have no indication of how the plaintiffs came into possession of the money and I have no desire to deprive the rightful owners of the money.

The mandate of due process requires more than the third option. To adopt this third option would allow the state to seize an item at will and keep it unless the victim could prove that the state was wrong. It properly should be the burden of the state to justify the retention of a seized item and establish a superior right to it.

Thus, the second option is the appropriate remedy here. It allows one who still can prove an interest in the property superior to Sell's and Konder's to do so; yet it

rightly places the burden upon the state to prove its superior right if it claims one.

Because this money was contraband only because it was possessed by an inmate within the walls of a prison, and not contraband *per se*, this disposition of the case is consistent with the law relating to the return of property under Rule 41(e) of the Federal Rules of Criminal Procedure. Under that rule, confiscated property that is contraband *per se* is not to be returned to an inmate at the end of his term, while property that is contraband only because of the particular circumstances in which it is possessed is to be returned. See *Trupiano v. United States*, 334 U. S. 699 (1948), in which distilling equipment is contraband *per se* and will not be returned; *United States v. Jeffers*, 342 U. S. 48 (1951), in which cocaine and other drugs are contraband *per se* and will not be returned; and *One 1958 Plymouth Sedan v. Comm. of Pennsylvania*, *supra*, in which an automobile transporting illegal liquor is not contraband *per se* and must be returned.

The defendants' motion to compel answers to interrogatories will be denied. Assuming that the answers to those interrogatories would not be protected by the Fifth Amendment privilege against self-incrimination, those answers still could not affect the outcome here. I have found a denial of due process based on the permanent deprivation of property without due process of law. For the purpose of proceedings under the Civil Rights Act, it

matters not how the plaintiffs came into possession. The important thing is that they have been deprived, more than temporarily, of possession without due process of law.

Dated February 4, 1976.

BY THE COURT

/s/ Warren K. Urbom

Chief Judge